Number 79-1896

JUL 3 1980
MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner*,

v.

FRANK J. HALL, W. E. HALL, JR., MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. McCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents*.

BRIEF FOR RESPONDENTS IN OPPOSITION TO ARKANSAS LOUISIANA GAS COMPANY'S PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA

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July, 1980

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I.

PRELIMINARY STATEMENT

In light of the definitive judgments and orders as heretofore rendered by a United States district court,[1] three Louisi-

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[1] *Frank J. Hall, et al* v. *Arkansas Louisiana Gas Company*, Docket No. CA 75-1168 (Dist. Ct. W.D. La. 1976), "Judgment of Remand" rendered on February 2, 1976 pursuant to 28 U.S.C. 1447 (c) and (d).

ana state courts,[2] the Federal Power Commission (F.P.C.)[3] and the Federal Energy Regulatory Commission (F.E.R.C.),[4] as "collaborative instrumentalities of justice", in connection with six years of duplicative and parallel litigation involving a private breach of contract and damage dispute between the fifteen individual respondents herein and Arkansas Louisiana Gas Company (Arkla), it is now abundantly clear that Arkla, the wrongdoer in the private breach of contract case, has from September 1961 through December 1975 *wrongfully injured* and *damaged* respondents in the *same* wrongful manner that the Kerr-McGee Corporation, Cities Service Gas Company, the Gulf Oil Corporation and the Louisiana-Nevada Transit Company also *wrongfully* injured and damaged other citizens of this Nation by likewise uncooperatively breaching and violating private legal and contractual rights under similar private gas sales contracts. See: *Eastern Petroleum Co., et al* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971); *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 Pac.2d 1236

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[2] *Frank J. Hall, et al* v. *Arkansas Louisiana Gas Company*, Docket No. 225,699, First Judicial District Court, Caddo Parish, Louisiana, "Judgment" rendered on October 14, 1977, "Judgment" rendered on December 5, 1977, and "Judgment" rendered on May 17, 1979.

Frank J. Hall, et al v. *Arkansas Louisiana Gas Company*, 359 So.2d 255 (La.App.2d 1978).

Frank J. Hall, et al v. *Arkansas Louisiana Gas Company*, 368 So.2d 984 (La.S.Ct. 1979).

Frank J. Hall, et al v. *Arkansas Louisiana Gas Company*, 379 So.2d 1142 (La.App.2d 1980).

Frank J. Hall, et al v. *Arkansas Louisiana Gas Company*, Docket No. 67,225, Supreme Court of Louisiana, application for certiorari *denied* on May 2, 1980.

[3] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al*, Docket No. RI 76-28, Federal Power Commission, "Orders" issued on March 8, 1976 and November 8, 1976, respectively.

[4] *Arkansas Louisiana Gas Company* v. *Frank J. Hall, et al*, Docket No. RI 76-28, Federal Energy Regulatory Commission, "Orders" issued on April 25, 1979, May 18, 1979 and July 16, 1979, respectively.

(Okla. 1972), appeal *dismissed* and cert. *den.*, 409 US. 1052 (1972); *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278 (D.C. Cir. 1976); *Gulf Oil Corp.* v. *American-Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960); and *Louisiana-Nevada Transit Co.* v. *Dalton J. Woods*, 393 F.Supp. 177 (W.D. Ark. 1975).

Arkla, the wrongdoer in this private breach of contract case, has as part of its egregious and continuing effort to unjustly take advantage of and to profit by virtue of its own uncooperative breach of contract and continued legal fault from September 1961 through December 1975 at respondents' loss, damage, detriment and expense now filed *three* separate petitions for a writ of certiorari with this Court, ie. Docket Nos. 78-986, 78-1789 and 79-1896.

As the fifteen individual respondents herein have previously demonstrated in their responses filed in Docket Nos. 78-986 and 78-1789 and will herein again demonstrate, this Court should in the interest of fundamental justice *deny* all *three* of Arkla's petitions for a writ of certiorari because it has now been conclusively established and confirmed that under the factual circumstances of this private breach of contract and damage dispute and the applicable cases respondents' recovery of compensatory damages from Arkla's *own* excessive private corporate *profits* [5] for the actual losses and damages sustained and incurred by respondents with respect to their extracted liquid hydrocarbons, plant products and dry or residue natural gas due to Arkla's continued breach of contract from 1961 through 1975 does *not* in any possible way adversely involve

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[5] During the fourteen years that Arkla wrongfully injured and damages respondents by virtue of its continued breach of contract and uncooperative withholding of all of the true facts from respondents for fourteen years, Arkla, a corporate conglomerate that owns and operates many different private businesses and diverse private enterprises, has amassed *over* $1,000,000,000.00 in private corporate assets; grossed *over* $5,000,000,000.00 in private corporate earnings; reaped *over* $1,000,000,000.00 in excessive private corporate profits; and distributed *over* $275,000,000.00 in cash dividends to its own private stockholders.

or affect the Commission's (F.P.C. and F.E.R.C.) regulatory responsibility under section 4(d) of the Natural Gas Act to protect "the relevant public interest" against "excessive prices" for residue natural gas sold in interstate commerce from 1961 to 1972.

II.

THE QUESTIONS PRESENTED BY ARKLA'S THREE PETITIONS FOR A WRIT OF CERTIORARI

In light of the adverse judgments and orders from the United States district court, the Louisiana state district court, the Louisiana state court of appeal, the Louisiana supreme court, the F.P.C. and the F.E.R.C. with respect to the factual, jurisdictional and breach of contract issues as definitively resolved and adjudicated adversely to Arkla in connection with this private breach of contract and damage dispute during the past six years, Arkla has filed *three* petitions for a writ of certiorari with this Court. Arkla in its *three* petitions has rather diffusely and in an interwoven fashion continuously reasserted three alleged errors with respect to the adverse judgments and orders of the *six* tribunals (three state courts and three Federal tribunals) which have heretofore consistently resolved and adjudicated the factual, jurisdictional and breach of contract issues as presented in the instant private breach of contract case adversely to Arkla.

Arkla, in its *first* petition for a writ of certiorari as filed with this Court on December 18, 1978, Docket No. 78-986, erroneously asserted and specified two alleged errors, to wit:

(1) The United States district court for the western district of Louisiana, the Louisiana state district court, the Louisiana state court of appeal, the Louisiana supreme court, the F.P.C. and the F.E.R.C. have consistently erred in unanimously determining that the Louisiana state courts had the legal jurisdiction and authority to try, resolve and adjudicate a private breach of contract and damage dispute between respondents and Arkla; and

(2) Alternatively, even if the Louisiana state courts had the legal jurisdiction and authority to construe and interpret

> a "most favored nations" clause, as contained in the 1952 private gas sales contract negotiated and perfected between respondents and Arkla, in order to determine and confirm the *"true intentions"* of the parties when they negotiated and perfected said private contract on January 11, 1952, the Louisiana courts consistently erred in their application of ordinary rules of private contract law to the actual *evidence* adduced at the trial of this case on its merits in determining and confirming the *"true intentions"* of the parties when they negotiated and perfected the private contract on January 11, 1952.

Arkla's first two specifications of alleged error obviously related to the jurisdictional issue and the liability or breach of contract issue which had been unanimously resolved and adjudicated adversely to Arkla by the three Louisiana state courts and the three Federal tribunals in connection with the instant private breach of contract and damage case. In light of the specific factual circumstances of this private breach of contract and damage case and the applicable and controlling cases,[6] this Court by virtue of an "Order" issued on October 1, 1979 correctly and properly *denied* Arkla's *first* petition for a writ of certiorari in Docket No. 78-986.

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[6] Skelly Oil Company, et al v. Phillips Petroleum Co., 339 U.S. 667 (1950); United Gas Pipe Line Co. v. Mobile Gas Corporation, 350 U.S. 332 (1956); United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958); Pan American Petroleum Corp. v. Superior Court of Delaware, 366 U.S. 656 (1961); Western Natural Gas Co. v. Cities Service Gas Co., 507 Pac.2d 1236 (Okla. 1972), appeal dismissed and cert. den., 409 U.S. 1052 (1972); Cities Service Gas Co. v. F.P.C., 535 F.2d 1278 (D.C. Cir. 1976); Gulf Oil Corp. v. American-Louisiana Pipeline Co., 282 F.2d 401 (6th Cir. 1960); Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., 297 F.2d 561, 566 (8th Cir. 1962); State of Louisiana v. F.P.C., 503 F.2d 844 (5th Cir. 1974); Skelly Oil Co. v. F.P.C., 532 F.2d 177 (10th Cir. 1976); Monsanto Co. v. F.P.C., 463 F.2d 799 (D.C. Cir. 1972); International Paper Co. v. F.P.C., 476 F.2d 121 (5th Cir. 1973); City of New Orleans, La. v. United Gas Pipe Line Co., 390 F.Supp. 861 (E.D.La. 1974); Louisiana-Nevada Transit Co. v. Dalton J. Woods, 393 F.Supp. 177 (W.D. Ark. 1975); Eastern Petroleum Co., et al v. Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971); Phillips Petroleum Co. v. F.P.C., 349 F.2d 535

Arkla, in its *second* petition for a writ of certiorari as filed with this Court on May 29, 1979 in Docket No. 78-1789, reasserted the same two specified errors as set forth in its *first* petition in Docket No. 78-986 and added a third specification of error, which related in a limited fashion to the "quantum of compensatory damages" issue, by erroneously asserting that:

(3) Even if the Louisiana courts had the legal jurisdiction and authority to try, resolve and adjudicate the private breach of contract and damage dispute between respondents and Arkla and even if the Louisiana courts had properly determined that Arkla had wrongfully injured and damaged respondents from 1961 to 1975 by continuously breaching and violating respondents' private legal and contractual "most favored nations" rights from 1961 through 1975 and by uncooperatively withholding all of the true facts concerning its continued breach of contract from respondents from 1961 to 1975, under our American System of Justice respondents may not recover compensatory damages out of Arkla's own private corporate profits for the actual losses and damages which they have sustained and incurred with respect to their dry or residue natural gas from September 1961 through September 1972 *because* Arkla through its own uncooperative breach of contract and continued legal fault from 1961 to 1975 absolutely prevented and effectively precluded respondents from timely preparing and prospectively filing routine notices setting forth their "severable" and "contractually authorized prices" for their dry or residue natural gas under their private 1952 contract with the F.P.C. pursuant to section 4(d) of the Natural Gas Act for the limited period September 1961 through September 1972.

(10th Cir. 1965); and Shell Oil Co. v. F.P.C., 531 F.2d 1324 (5th Cir. 1976); Merle M. Rowan v. Allied Chemical Corp., 39 F.P.C. 64 (1968), "order" issued January 17, 1968; L. E. Smith, et al, Docket No. RI 67-110, "order" issued January 9, 1967; Pan American Petroleum Corp., et al, Docket Nos. RI 63-481, et al, "orders" issued October 9, 1964 and December 3, 1964, respectively; Western Natural Gas Co. v. Cities Service Gas Co., Docket No. G-14958, "order" issued July 24, 1967; Plaquemines Oil & Gas Co. v. F.P.C., 450 F.2d 1334 (D.C. Cir. 1971); The City of Piqua, Ohio v. F.E.R.C., 610 F.2d 950 (D.C. Cir. 1979); and Niagara Mohawk Power Corp. v. F.P.C., 379 F.2d 153 (D.C. Cir. 1967).

In attacking the Louisiana supreme court's "judgment" of March 5, 1979 and the Louisiana district court's "judgment on remand" from the Louisiana supreme court dated May 17, 1979, Arkla, the wrongdoer, has by virtue of the unconscionable "Catch-22" theory as set forth in its *second* petition in Docket No. 78-1789 demanded that this Court reduce the quantum of compensatory damages as awarded to respondents in the private breach of contract case from approximately $2,700,000.00 to $1,700,000.00. Respondents, in their response to Arkla's *second* petition in Docket No. 78-1789 and in their "Application For a Waiver" of the prospective section 4(d) notice filing requirements, as formally filed with the F.E.R.C. on May 24, 1979, have heretofore demonstrated that Arkla's unconscionable "Catch-22" attempt to legally rely upon and to take advantage of its own uncooperative breach of contract and continued legal fault from 1961 to 1975 in order to improperly escape and unilaterally evade its own independent and private contractual responsibility to respond in compensatory damages out of its *own* excessive private corporate *profits* for the actual losses and damages that respondents have sustained and incurred with respect to their dry or residue natural gas for the limited period September 1961 through September 1972 is absolutely abhorent to fundamental American Justice. Moreover, respondents have heretofore demonstrated that in light of the applicable "orders" of the F.P.C. and the F.E.R.C. in the related and parallel administrative proceeding respondents' recovery of compensatory damages from Arkla's own excessive private corporate profits for the actual losses and damages which they have sustained and incurred with respect to their dry or residue natural gas for the limited period September 1961 through September 1972 due to Arkla's continued breach of contract and uncooperative legal fault does *not* in any possible way adversely involve or affect the Commission's (F.P.C. and F.E.R.C.) regulatory responsibility to protect "the relevant public interest" against "excessive prices" for dry or residue gas sold in interstate commerce from 1961 to 1972 under section 4(d) of the Natural Gas Act.

Further, as respondents have conclusively demonstrated in connection with their response to Arkla's *second* petition in Docket No. 78-1789 and in their formal "Application For a Waiver", as filed with the F.E.R.C. on May 24, 1979, Arkla's self-serving contention that respondents' recovery of compensatory damages out of its own private corporate profits for that portion of the actual losses and damages sustained and incurred with respect to their dry or residue natural gas for the limited period 1961 to 1972 might conflict with the regulatory purpose of section 4(d) of the Natural Gas Act is entirely erroneous and has obviously been asserted by Arkla in a desperate effort to unjustly preserve a portion of its *own* excessive private corporate *profits* (*over* $120,000,000.00 each year) and to maintain the extremely high level of cash dividends which Arkla distributes to its private stockholders each year (*over* $35,000,000.00 each year) at respondents' loss, damage, detriment and expense. It is now abundantly clear that the F.E.R.C. has properly rendered Arkla's unconscionable "Catch-22" prospective notice filing contention absolutely "*moot*" by fully performing its "*review function*" under section 4(d) of the Natural Gas Act with respect to respondents' "severable" and "contractually authorized prices" for their dry or residue natural gas under the private 1952 contract as negotiated and perfected by respondents and Arkla for the limited period September 1961 through September 1972.

As respondents have heretofore demonstrated and will hereinafter again demonstrate, the F.E.R.C. by performing its "*review function*" under section 4(d) of the Natural Gas Act with respect to respondents' "severable" and "contractually authorized prices" for their dry or residue gas under the private 1952 contract between respondents and Arkla for the "certain period" September 1961 through September 1972 has by virtue of its "orders" issued on April 25, 1979, May 18, 1979 and July 16, 1979, respectively, correctly determined and conclusively confirmed that respondents' "severable" and "contractually authorized prices" for their dry or residue gas under the 1952 private contract for the "certain period" September 1961 through September 1972 were well *below* and fully con-

sistent with the Commission's established and approved "maximum, lawful, just and reasonable area rate ceilings" for the sale of dry or residue gas in interstate commerce from 1961 to 1972 and, hence, respondents' "severable" and "contractually authorized prices" for their dry or residue natural gas under the private 1952 contract between respondents and Arkla do *not* in any possible way adversely involve or affect the Commission's regulatory responsibility to protect "the relevant public interest" against "excessive prices" for dry or residue natural gas sold in interstate commerce from September 1961 through September 1972 under section 4(d) of the Natural Gas Act.

Arkla's *second* petition for a writ of certiorari in Docket No. 78-1789 specifically attacked those portions of the Louisiana supreme court's "judgment" dated March 5, 1979 (Arkla's appendix A) and the "judgment" of the Louisiana state district court on remand from the Louisiana supreme court dated May 17, 1979 (Arkla's appendix C) which granted respondents a recovery of compensatory damages for all of their actual losses and damages from 1961 to 1975, including that portion of their actual losses and damages which respondents had sustained and incurred from September 1961 to September 1972 with respect to their dry or residue natural gas due to Arkla's continued breach of contract and uncooperative withholding of all of the true facts from respondents from 1961 to 1975, i.e. approximately $1,000,000.00. After Arkla filed its *second* petition (Docket No. 78-1789) with this Court on May 29, 1979, Arkla "appealed" the Louisiana supreme court's "judgment" of March 5, 1979 and the Louisiana district court's "judgment" on remand from the Louisiana supreme court dated May 17, 1979 to a Louisiana court of appeal on the erroneous basis that "new issues" were for the first time being presented in this private breach of contract case.

In that Arkla's last state court "appeal" obviously presented *no* "new issues" and was in light of the Louisiana supreme court's "judgment" of March 5, 1979, the F.P.C.'s "order" of

March 8, 1976, the F.P.C.'s "order" of November 8, 1976, the F.E.R.C.'s "order" of April 25, 1979, the F.E.R.C.'s "order" of May 18, 1979, and the F.E.R.C.'s "order" of July 16, 1979 completely void of any merit whatsoever, Arkla's last state court "appeal" was *denied* on January 22, 1980 by the Louisiana second circuit court of appeal.[7]

Nevertheless, Arkla on May 30, 1980 filed a *third* petition for a writ of certiorari in connection with this private breach of contract case in Docket No. 79-1896 wherein Arkla has again diffusely reasserted and rehashed the same alleged "issues" which were previously presented by its petitions in Docket Nos. 78-986 and 78-1789. In that this Court correctly and properly *denied* Arkla's *first* petition for a writ of certiorari in Docket No. 78-986 on October 1, 1979, the only remaining "issue" as presented by Arkla's *second* petition (Docket No. 78-1789) and Arkla's *third* petition (Docket No. 79-1896) is:

> Whether under the specific facts of this private breach of contract case respondents' recovery of compensatory damages out of Arkla's own private corporate profits in the sum of $1,000,000.00 for that portion of the actual losses and damages that respondents sustained and incurred with respect to their dry or residue natural gas from September 1961 to September 1972 due to Arkla's continued breach of contract and uncooperative withholding of all of the true facts from respondents from 1961 to 1975 adversely affects or involves the Commission's regulatory responsibility to protect "the relevant public interest" against "excessive prices" for dry or residue natural gas sold in interstate commerce from 1961 to 1972 under section 4(d) of the Natural Gas Act?

As respondents will herein demonstrate, the F.E.R.C. by actually performing its section 4(d) *"review function"* with respect to respondents' *"severable"* and *"contractually authorized prices"* for their dry or residue natural gas under the 1952 private contract for the "certain period" September 1961 to

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[7] *Frank J. Hall, et al v. Arkansas Louisiana Gas Company*, 379 So.2d 1142 (La.App.2d 1980).

September 1972 has from a substantive standpoint conclusively confirmed the wholly erroneous and meritless nature of Arkla's bald assertions as repeatedly set forth in Arkla's petitions in Docket Nos. 78-1789 and 79-1896 concerning the "justness and reasonableness" of respondents' "contractually authorized prices" for their residue natural gas *and* has effectively rendered these erroneous allegations absolutely *moot*. Further, from a technical procedural standpoint, the F.E.R.C.'s granting of respondents' pending "Application For a Waiver" dated May 24, 1979, for "good cause shown", will also completely render *moot* Arkla's unconscionable and self-serving "Catch-22" contentions as repeatedly set forth in its petitions in Docket Nos. 78-1789 and 79-1896 whereby Arkla is attempting to improperly rely upon and unjustly take advantage of the fact that Arkla's own continued breach of contract and uncooperative legal fault from 1961 to 1975 rendered it absolutely *impossible* for respondents to prospectively make the routine notice filings with the F.P.C. from 1961 to 1972 concerning their "contractually authorized prices" for their dry or residue natural gas under the private 1952 contract.

III.

REASONS WHY ARKLA'S PETITIONS IN DOCKET NOS. 78-1789 AND 79-1896 SHOULD ALSO BE DENIED

A. Arkla's Erroneous and Self-Serving Contentions In Docket Nos. 78-1789 and 79-1896 Have Been Completely Eliminated and Rendered Moot by the F.E.R.C.'s Performance of Its Section 4(d) Review Function in the Related and Parallel Administrative Proceeding.

In squarely addressing and correctly answering Arkla's erroneous contention that respondents' "severable" and "contractually authorized prices" for their dry or residue natural gas under the 1952 private contract for the "certain period" September 1961 to September 1972 exceed and violate the F.E.R.C.'s "maximum, lawful, just and reasonable area rate ceilings" for the sale of residue natural gas in interstate commerce from 1961 to 1972, the F.E.R.C. has now fully performed its section 4(d) "review function" with respect to

respondents' "severable" and "contractually authorized prices" for their dry or residue natural gas under the 1952 private contract for the "certain period" September 1961 through September 1972. Specifically, in addressing Arkla's wholly erroneous and self-serving contentions with respect to the "justness and reasonableness" of respondents' "contractually authorized prices" for their residue natural gas under the 1952 private contract for the 1961 to 1972 period, the F.E.R.C. and its staff counsel have consistently and correctly concluded that:

(1) *August 23, 1978*—The F.E.R.C.'s staff counsel correctly concluded that respondents' recovery of compensatory damages for their actual losses and damages sustained with respect to their dry or residue gas from September 1961 through December 1975 would *not* adversely affect the Commission's regulatory responsibility to protect "the relevant public interest" against "excessive prices" for residue natural gas sold in interstate commerce:

> "Only contracts executed prior to April 3, 1961 may contain favored nations clauses. Therefore, contracts involving jurisdictional sellers which contain these clauses will become relatively infrequent.
>
> Concern that a court might order Arkla to pay excessive rates in the guise of contract damages is not warranted under the circumstances of this case. Even if respondents are entitled to a rate increase, the applicable ceiling rates under the Commission's regulations will impose a limitation on the damages respondents may receive from a court. . .
>
> Therefore, the issue in this case is limited to the damages respondents may receive up to these ceiling rates; the question whether such damages would constitute an unreasonable and unjust rate, which would be in the exclusive jurisdiction of the Commission, Montana-Dakota Utilities v. Northwestern Public Service Co., 341 U.S. 246 (1951), is not present. Therefore, the Commission's regulatory responsibility to protect consumers from excessive rates is not involved."

(2) *April 25, 1979*—The F.E.R.C. in properly performing its section 4(d) "review function" with respect to respondents' "severable" and "contractually authorized prices" under the private 1952 contract for their dry or residue

gas for the "certain period" September 1961 through September 1972 properly "ordered" that:

"To aid it in its determination of the jurisdictional questions in this case this Commission needs some additional information.

The Supreme Court of Louisiana stated in an opinion in a parallel case [1] that:

> We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission.

The trial court in Louisiana stated: [2]

> The evidence demonstrates that the price paid to the United States per Mcf of gas was below the maximum area rate. . .

This Commission is interested in the basis on which the Louisiana Courts awarded damages for gas. We want to know at what price per Mcf of gas the courts awarded damages to the Hall plaintiffs. We also want to know what damages were demanded by the plaintiffs in the Louisiana courts.

(A) Hall, *et al.* to file with this Commission within ten days:

(1) A copy of the complaint filed in the Louisiana proceedings, including all amendments to that complaint;

(B) The parties to these proceedings to file with the Commission within ten days:

(1) A summary of the damages awarded by the Louisiana Courts. The summary shall show what price per Mcf of gas the Louisiana Courts decided

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[1] *Frank J. Hall, et al* v. *Arkansas Louisiana Gas Company*, No. 62,560, March 5, 1979, p.12, n.7.

[2] *Hall* v. *Arkansas Louisiana Gas Company*, 1st Judicial District Court, Caddo Parish, Louisiana; No. 225,699, October 14, 1977.

that the Hall plaintiffs were entitled to broken down by time periods. We are specifically interested in damages for the gas as opposed to damages awarded for any extracted liquids. A party may wish to provide a breakdown of the total damages showing the damages per Mcf for the gas, and the damages per Mcf for the liquids. But each party must show the damages per Mcf for the gas for every time period. We also stress that we want a summary showing what the Louisiana Courts actually did rather than any attempt to relitigate the damages determined by the Louisiana Court. In its summary each party shall explain the evidentiary basis of its summary and shall include copies of the evidence it believes was actually used by the courts in determining damages; . . ."

(3) *May 18, 1979*—The F.E.R.C. in properly performing its section 4(d) "review function" with respect to respondents' "severable" and "contractually authorized prices" for their residue natural gas under the private 1952 contract for the "certain period" September 1961 through September 1972 in order to fully carry out its regulatory responsibility of protecting "the relevant public interest" against "excessive prices" for residue natural gas sold in interstate commerce from 1961 to 1972 correctly concluded that:

"The Louisiana court properly looked to the intentions of the parties to the contract in determining the meaning of the contract. . .

On April 25, 1979, we issued an 'Order Requesting Additional Information to Supplement Record.' Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed applicable area ceiling rates. . .

The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate. . .

. . . [W]e find that the rates requested are within what the Commission has determined to be the zone of reasonableness. . . .

The Louisiana Supreme Court, however, has awarded damages back to 1961. It concluded that it was Arkla's fault that the Hall group has not filed for a rate increase prior to 1972. . .

On the facts of this case, the damages do not exceed applicable area ceiling rates. . .

In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

The Commission orders:

Upon review on remand, we decline to exercise jurisdiction on this matter for the reasons stated above."

(4) *June 3, 1979*—The F.E.R.C. in an "Amici Curiae Brief" as filed with this Court in Docket No. 78-986 *again* confirmed the positive results of its having fully performed its section 4(d) "review function" with respect to respondents' "severable" and "contractually authorized prices" for their residue natural gas under the private 1952 contract for the certain period 1961 to 1972, as well as from 1972 through 1975, to wit:

"The Natural Gas Act may reinforce private contractual rights or abrogate them when they contravene relevant public interests. See e.g., Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968). However, absent adverse effects on the interests protected by the regulatory scheme—for example, prices in excess of established ceilings—the parties should be left to the bargain they have made. This is an appropriate rule even though, under Section 4(c) of the Natural Gas Act, 15 U.S.C. 717c(c), every contract for the interstate sale of gas had to be filed with the Commission. Otherwise, the Commission and the federal

courts would be inundated by 'a vast current of [contract] litigation indubitably arising under State law****.' Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 673 (1950). . .

Nor does construction of the favored nations clause on the basis of the intentions of the contracting parties affect the Commission's regulatory responsibilities. Resolution of the dispute turns on evidence of dealings between the parties relevant only to this case. . .

The respondents claimed no damages in excess of rate ceilings established by Commission orders. Thus, while the Commission undoubtedly has primary jurisdiction to consider the reasonableness of rates and practices in order to prevent disruption of the regulatory scheme and the unbalancing of existing rate structures (United States v. Radio Corporation of America, supra, 385 *.S. at 348), no such issues were presented.

Respondents sought only to recover from petitioner rates to which they were legally entitled under their contracts and the Natural Gas Act. Under the National Gas Act and well established federal law, jurisdictional sellers of gas are entitled only to rates set forth in their filed rate schedules or (to the extent they are excused from filing such schedules) under their contract pricing provisions, but in no event in excess of Commission established ceilings. . .

Since the measure of damages claimed turned on lease payments to the United States which did not exceed Commission applicable area ceilings (App. infra, 15a), there was no question concerning the reasonableness of the rates for the Commission to consider."

(5) *July 16, 1979*—The F.E.R.C. in the related and parallel administrative proceeding issued an "Order Denying Rehearing" wherein the Commission in connection with its performance of its section 4(d) "review function" in pertinent part concluded that:

"On May 18, 1979, this Commission issued an 'Order Declining Jurisdiction After Reconsideration of the Issue on Remand.' Applications for rehearing and reconsideration of that order have been received from all parties in this proceeding. Those applications are denied."

Certainly, the positive results from the F.E.R.C.'s performance of its section 4(d) "review function" with respect to respondents' "severable" and "contractually authorized prices" for their residue natural gas under the private 1952 contract for the "certain period" September 1961 through September 1972 have completely eliminated and rendered *moot* the wholly erroneous and self-serving contentions as repeatedly set forth in Arkla's petitions in Docket Nos. 78-1789 and 79-1896 with respect to the "justness and reasonableness" of respondents' "severable" and "contractually authorized prices" for their dry or residue natural gas under the private 1952 contract for the "certain period" September 1961 through September 1972, as well as from October 1972 through December 1975.

B. Pursuant to the Comments and Suggestions of the F.E.R.C. and Its Staff Counsel Respondents Have Formally Filed For and Shown Good Cause For A Waiver of the Prospective Notice Filing Requirements of Section 4(d) of the Natural Gas Act for the Limited Period September 1961 to September 1972.

After the F.P.C. had properly deferred the resolution and adjudication of the private breach of contract and damage dispute between respondents and Arkla to the Louisiana courts by virtue of its "orders" of March 8, 1976 and November 8, 1976, respectively, and after the Louisiana supreme court rendered its final and definitive judgment in the private breach of contract case between respondents and Arkla on March 5, 1979, the F.E.R.C.'s staff counsel concluded and suggested that in order for respondents to completely remove and eliminate any technical or theoretical conflict between respondents' recovery of compensatory damages for the actual losses and damages which they had sustained and incurred with respect to their residue natural gas from 1961 to 1972 due to Arkla's continued breach of contract and Arkla's uncooperative withholding of all of the true facts from respondents from 1961 to 1975 *and* the Commission's primary jurisdiction and authority to grant "waivers" of the prospective notice filing requirements of section 4(d) of the Natural Gas

Act, respondents should in the related and parallel administrative proceeding formally "seek and obtain" a "waiver" of the prospective section 4(d) notice filing requirements with respect to their "severable" and "contractually authorized prices" for their residue natural gas under the private 1952 contract for the limited period September 1961 to September 1972. Specifically, the F.E.R.C.'s staff counsel on April 16, 1979 concluded and suggested that:

> "The question of whether to waive the filing requirement of § 4(d) of the Natural Gas Act under these circumstances is within the primary jurisdiction of the Commission. Moreover, it is important, we believe, for the Commission to exercise its jurisdiction in this case insofar as it relates to the filing requirements under the Natural Gas Act and the Commission's regulations pertaining thereto. Aside from the Commission's expertise in such matters, the decisions on these issues should be consistent.
>
> The Commission is reconsidering the prior orders issued by the FPC in this proceeding which have been remanded from the U.S. Court of Appeals. Hall has not requested in this proceeding that the Commission waive the filing requirements of § 4(d) of the Natural Gas Act. Therefore, it would be appropriate for the Commission, in addition to asserting that it has primary jurisdiction, to reassert the position taken by the FPC in its June 4, 1976 order in this proceeding that Hall is not entitled prior to October 10, 1972 to any rate in excess of that on file with the Commission and in effect under its FERC Gas Rate Schedule No. 4 unless or until it seeks and obtains waiver of the requirements. Staff adheres to the position taken in its brief that it is unnecessary for the Commission to exercise its primary jurisdiction to determine whether the favored nation clause at issue here has been triggered."

After respondents were able to fully comply with the F.E.R.C.'s "order" dated April 25, 1979 in connection with the F.E.R.C.'s performance of its section 4(d) "review function" with respect to respondents' "severable" and "contractually authorized prices" for their dry or residue natural gas for the "certain period" September 1961 to September 1972 and after

the FE.R.C. had completed its section 4(d) "review function" on May 18, 1979, respondents on May 24, 1979 formally filed an "Application For a Waiver" of the prospective section 4(d) notice filing requirement of the Natural Gas Act with the F.E.R.C. for the limited period September 1961 to September 1972 in order to completely eliminate and render *moot* Arkla's unconscionable "Catch-22" attempt to legally rely upon and to unjustly take advantage of the fact that Arkla by virtue of its own continued breach of contract and uncooperative withholding of all of the true facts from respondents from 1961 to 1975 absolutely *prevented* and *precluded* respondents from prospectively preparing and filing the routine notices with the F.P.C. from 1961 to 1972. A true copy of respondents' "Application For a Waiver", as filed with the F.E.R.C. on May 24, 1979, was attached as appendix A to respondents' brief in opposition to Arkla's *second* petition in Docket No. 78-1789.

In light of the numerous other cases [8] in which the F.P.C., the F.E.R.C. and the appropriate courts have during the past *twenty* years heretofore consistently granted scores of "waivers" of the identical prospective notice filing requirements of

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[8] Plaquemines Oil & Gas Co. v. FPC, 450 F.2d 1334 (D.C. Cir. 1971); The City of Piqua, Ohio v. F.E.R.C., 610 F.2d 950 (D.C. Cir. 1979); Dayton Power & Light Co., Docket No. ER77-546 (1978); Central Maine Power Co. v. FPC, 345 F.2d 875 (1st Cir. 1965); Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153 (D.C. Cir. 1967); Moss v. C.A.B., 521 F.2d 298 (D.C. Cir. 1975); Southern Railway Co. v. United States, 412 F.Supp. 1122 (Dist.Ct. for D.C. 1976); Duke Power Company, FPC Docket No. E-7513, "order" of February 9, 1970; New England Power Company, FPC Docket No. E-7729, "order" of May 19, 1972; Boston Edison Co., 50 F.P.C. 557 (1973); Arizona Public Service Co., FPC Docket Nos. E-9280, E-9281, E-9282, and E-9283, "order" of March 21, 1975; Arizona Public Service Co., FPC Docket No. ER77-188, "letter order" of April 8, 1977; Electric Energy, Inc., FPC Docket No. ER77-176, "letter order" of April 11, 1977; Potomac Electric Power Co., FERC Docket No. ER77-429, "order" of June 30, 1977; Oklahoma Gas & Electric Co., FERC Docket No. ER78-423, "order" of June 30, 1978; Arizona Public Service Co., FERC

section 4(d) of the Natural Gas Act and section 205(d) of the Federal Power Act, respectively, to numerous other citizens of this Nation, it is clear that the F.P.C., the F.E.R.C. and the courts have during the past twenty years consistently found "good cause" for the granting of similar requests for "waivers" in numerous other cases where the moving applicants have shown that:

(1) The *"contractually authorized prices"* for the period of time in question, as determined by the *"true intentions"* of the parties to each specific private contract in question, were *below* and, hence, consistent with the *"in-line prices"* and/or the *"maximum, lawful, just and reasonable area rate ceilings"* as previously approved and established by the Commission in light of *"the relevant public interest"* against *"excessive prices"* for residue natural gas and/or electricity sold in interstate commerce;

and

(2) The seller's failure and/or inability to timely prepare and prospectively make the notice filings setting forth his *"contractually authorized prices"* under his privately negotiated contract with the Commission was due to *"excusable"*, *"inequitable"*, and/or *"unavoidable"* circumstances.

With respect to the *first part* of the F.P.C.'s and the F.E.R.C.'s fair two-part test and objective standard for determining "good cause" for the granting of "waivers" of the prospective notice filing requirements of the Natural Gas Act and the Federal Power Act, respondents in support of their

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Docket Nos. ER78-429 and ER78-430, "order" of July 13, 1978; Consumers Power Co., FERC Docket No. 78-437, "order" of July 21, 1978; North States Power Co. of Minnesota, FERC Docket Nos. ER77-593, ER77-596, ER77-626, ER77-633, ER77-634, ER 78-38, "order" of December 2, 1977; Kansas City Power & Light Co., FERC Docket No. ER78-25, "order" of November 17, 1977; New England Power Co., FERC Docket No. ER78-44, "order" of December 9, 1977; Utah Power & Light Co., FERC Docket No. ER78-216, "order" of June 30, 1978.

pending "Application For a Waiver" dated May 24, 1979 have conclusively shown and established that:

> Respondents' "severable" and "contractually authorized prices" for their residue natural gas under the private 1952 contract for the "certain period" September 1961 through September 1972 were well *below* the Commission's established and approved "maximum, lawful, just and reasonable area rate ceilings" for the 1961 to 1972 period and, hence, said "contractually authorized prices" did *not* in any possible way contravene or adversely affect the Commission's regulatory purpose of protecting "the relevant public interest" against "excessive prices" for residue natural gas sold in interstate commerce.

With respect to the *second part* of the F.P.C.'s and the F.E.R.C.'s fair two-part test and objective standard for determining "good cause" for the granting of "waivers" of the prospective notice filing requirements of the Natural Gas Act and the Federal Power Act, respondents in support of their pending "Application For a Waiver" dated May 24, 1979 have conclusively shown and established that:

> Respondents were absolutely *prevented* and *precluded* from timely making the routine section 4(d) notice filings from 1961 to 1972 in that it was physically and humanly *impossible* for them to have timely prepared and filed the routine notices setting forth their "contractually authorized prices" for their residue natural gas with the Commission from September 1961 through September 1972 *because* Arkla, through its own uncooperative legal fault and continued breach of contract, had effectively withheld and uncooperatively concealed *all* of the true, relevant and material facts necessary for respondents' preparation of the notice filings from respondents from September 1961 through December 1975.

After respondents definitively concluded the breach of contract case on May 17, 1979 and formally filed their "Application For a Waiver" with the F.E.R.C. on May 24, 1979, the F.E.R.C. has taken the following action:

(1) *July 16, 1979*—The F.E.R.C. issued an *"Order Denying Rehearing"* wherein the Commission in pertinent part concluded and stated that:

"The Commission has also received an application for waiver of Section 4(d) of the Natural Gas Act. The application for waiver will be dealt within a separate order. This denial of rehearing does not affect or prejudge the application for waiver."

(2) *February 11, 1980*—The F.E.R.C. in an "Amici Curiae Brief" as filed with this Court in connection with Arkla's *second* petition in Docket No. 78-1789 concluded and stated that:

"In 1974 respondents sued Arkla in a Louisiana state court for breach of contract; . . .

. . . After several decisions and a remand from the United States Court of Appeals for the District of Columbia Circuit, the Commission ultimately denied Arkla's petition on May 18, 1979 (App., infra, 1a-15-A). The Commission held that under the circumstances of this case, it would decline to exercise primary jurisdiction in respect of what it viewed as essentially a dispute over contract issues that do not require the Commission's expertise or implicate policies under the Natural Gas Act (id. at 7a-13a). It concluded that those were matters that could and should be resolved by the state courts, . .

After the decision of the court of appeal, the Supreme Court of Louisiana, although denying Arkla's petition for review, granted respondents' petition for review and reversed that part of the court of appeal's decision limiting respondents' recovery to the period after 1972. The Supreme Court of Louisiana concluded that Arkla had prevented respondents from making appropriate filings with the Commission before 1972 by not informing respondents of its lease payments; that the Commission would have approved respondents' filings for an increase; and that respondents should therefore be allowed to recover damages for the entire period between September 1961 through December 31, 1975. The instant petition seeks this Court's review of that decision.

> On May 24, 1979, respondents filed with the Commission and application for a waiver of the Commission's filing requirements, presumably on the assumption that if the Commission granted such a waiver, the filed rate doctrine would not bar their recovery of damages for the period prior to 1972. The Commission has not yet acted on that application. . . .
>
> Because the filed rate doctrine is an important principle of federal rate regulation, we normally would urge the Court to grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of Louisiana. However, if the Commission should grant the pending application for waiver of the filing requirement, the issue may well be moot. In the circumstances, the Court may wish to hold the petition to await the Commission's action."

In light of and consistent with its fair two-part test and objective standard for determining "good cause" for the granting of "waivers" of the identical prospective notice filing requirements of the Natural Gas Act and the Federal Power Act and the numerous prior cases in which it has heretofore during the past *twenty* years consistently granted numerous "waivers" to other citizens of this Nation, certainly the F.E.R.C. will in due course grant respondents' pending "Application For a Waiver" dated May 24, 1979 and, hence, grant to the respondents herein the *same equal justice* and the *same equitable remedy* that the F.E.R.C. and the United States court of appeals for the District of Columbia Circuit have heretofore properly granted and justly afforded to: (i) *37 other sellers* of residue natural gas in interstate commerce with respect to their "contractually authorized prices" under privately negotiated contracts for their residue natural gas for the "certain period" 1961 through 1966 in the leading case involving the *granting* of "waivers" of the prospective notice filing requirements of section 4(d) of the Natural Gas Act, i.e. *Plaquemines Oil and Gas Company* v. *Federal Power Commission*, 450 F.2d 1334 (D.C. Cir. 1971); (ii) to Dayton Power

and Light Company with respect to its "contractually authorized prices" under a privately negotiated contract in the leading case involving the *granting* of a "waiver" of the identical prospective notice filing requirements of section 205(d) of the Federal Power Act, i.e. *Dayton Power & Light Company*, Docket No. ER77-546 (1978), and the *City of Piqua, Ohio* v. *Federal Energy Regulatory Commission*, 610 F.2d 950 (D.C. Cir. 1979); and (iii) to scores of other citizens in numerous other cases involving the *granting* of "waivers" of the prospective notice filing requirements of the Natural Gas Act and the Federal Power Act during the past twenty years with respect to their "contractually authorized prices" under their privately negotiated contracts.

Certainly, the F.E.R.C.'s consistent and ultimate granting of respondents' pending "Application For a Waiver" dated May 24, 1979 will further completely eliminate and render *moot* the unconscionable "Catch-22" contentions as repeatedly set forth in Arkla's petitions in Docket Nos. 78-1789 and 79-1896.

In the final analysis, the well established rules and fundamental principles of law, equity, fairness and justice, as confirmed and applied in three leading and often cited decisions of this Court, eloquently answer and completely rebut the obviously unjust and self-serving "Catch-22" contentions as repeatedly set forth in Arkla's petitions in Docket Nos. 78-1789 and 79-1896, to wit:

(1) *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975):

> "And where a legal injury is of an economic character,
>
> > '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.' Wicker v. Hoppock, 6 Wall 94, 99, 18 L Ed 752 (1867)."

(2) *United States* v. *Peck,* 102 U.S. 64 (1880):

> "[T]he conduct of one party to a contract which prevents the other from performing his part is an excuse for non-performance. . . It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned."

(3) *R. H. Stearns Co.* v. *United States,* 291 U.S. 54 (1934):

> "The applicable principle is fundamental and unquestioned. 'He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned, for the law says to him in effect "this is your own act, and therefore you are not damnified."' *Dolan* v. *Rodgers,* 149 N.Y. 489, 491; 44 N.E. 167; and *Imperator Realty Co.* v. *Tull,* 228 N.Y. 447, 457; 127 N.E. 263; quoting *West* v. *Blakeway,* 2 Man. & G. 828, 839. Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong."

See also: *Restatement of Contracts,* §§ 294 and 295 (1932); 5 S. Williston, *Contracts,* § 677 (3rd ed. 1961); 17A C.J.S., *Contracts,* § 468a and b (1963); *Corbin on Contracts,* § 1266 (1951 ed.); Articles 1901, 1903, 1930 and 2040 of the *Louisiana Civil Code, Ballard* v. *El Dorado Tire Co.,* 512 F.2d 901 (5th Cir. 1975); *Ammerman* v. *Miller,* 488 F.2d 1285 (D.C. Cir. 1973); *Perrin* v. *Rodriguez,* 153 So. 555 (La. 1934); *Gulf Oil Corp.* v. *American-Louisiana Pipe Line Co.,* 282 F.2d 401 (6th Cir. 1960); *George W. Garig Transfer* v. *Harris,* 75 So.2d 27 (La.S.Ct. 1954); *Western Natural Gas Co.* v. *Cities Service Gas Co.,* 507 Pac.2d 1236 (Okla. 1972), appeal *dismissed* and cert. *den.,* 409 U.S. 1052 (1972); and *Cities Service Gas Company* v. *F.P.C.,* 535 F.2d 1278 (D.C. Cir. 1976).

IV.

CONCLUSION

For the foregoing reasons, Arkla's petitions for a writ of certiorari in Docket Nos. 78-1789 and 79-1896 should also be denied.

Respectfully submitted,

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Attorney for Respondents

July, 1980

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RESPONDENTS' APPENDIX A

ARKANSAS LOUISIANA GAS COMPANY

Internal Correspondence

Dated at Shreveport, Louisiana
January 15, 1974

To: Mr. G. L. Hetherwick

From: Jim Monk

Subject: D. B. McConnell, et al—Sligo Field, Louisiana

Enclosed is a copy of a letter dated January 11, 1974, concerning prices paid from the above referenced field. Please draft a reply to this letter stating that we have not exceeded the price stated in the contract. Therefore, the "Favored Nations" part of this contract has not been activated. I have enclosed the permanent file for your reference.

FILED IN EVIDENCE IN SUIT No. 225-699
December 3, 1976

/s/ SIGNATURE ILLEGIBLE
Deputy Clerk

JMH:jj

Enclosures

RESPONDENTS' APPENDIX B

ARKANSAS LOUISIANA GAS COMPANY

Internal Correspondence

Dated at Shreveport, Louisiana
January 17, 1974

To: Mr. Jim Monk

From: Gilbert L. Hetherwick

Subject: D. B. McConnell, *et al*
Sligo Field, Louisiana

Attached is a draft of a letter responding to Will Hall's letter of January 11, 1974, in accordance with your request of January 15, 1974.

I drafted this response like you requested to simply state that we are not paying a higher price than the price in his contract. However, that is not what he asked for. He asked for specific information concerning all contracts in the Sligo Field and particularly information concerning the price we are paying the United States Government (see page 2 of his letter).

I assume from your request that you meant to deliberately not give him what he had asked for. However, I would point out that Will Hall is a lawyer and our response looks like we may be putting him off. All he has to do is draft a petition and file it in order to sue us and then he can subpoena all the contracts he wants information about. This would be troublesome and probably expensive for Arkla and I would suggest that you would consider giving him more specifically the information he asks for unless there is some reason not to.

Your file is returned herewith.

Very truly yours,

/s/ GLH

FILED IN EVIDENCE IN SUIT No. 225-699
December 3, 1976

/s/ SIGNATURE ILLEGIBLE
Deputy Clerk

GLH/fm

Attachments

RESPONDENTS' APPENDIX C

ARKANSAS LOUISIANA GAS COMPANY

Internal Correspondence

Dated at Shreveport, Louisiana
November 20, 1961

To: Mr. J. C. Templeton

From: B. E. Harrell

Subject: U.S.A. Lease—Sligo

Received November 20, 1961
J. S. TEMPLETON

In answer to your letter of November 17, 1961, concerning royalty price applicable to the above lease, this is to advise that I have no particular opinion as to what price should be paid to royalty owners by ALG in this field. However, I do wish to caution you that we have a favored nations contract with W. E. Hall et al in this field and the price they are receiving is presently $0.08797 per MCF. I do not know whether our paying any royalty owner a higher price than $0.08797 would activate this favored nations clause; however, if the attorneys feel that there is no danger of a royalty price activating a favored nations clause, then I have no objection to paying the Government at a price substantially higher than $0.08797.

I wanted to bring this out, however, since any activation of favored nations clauses in this area would cost ALG several million dollars increase in cost of gas annually.

/s/ BILL

BEH:dm

cc: Mr. D. W. Weir
Mr. Robert Roberts, Jr.

RESPONDENTS' APPENDIX D

ARKANSAS LOUISIANA GAS COMPANY

Internal Correspondence

Dated at December 27, 1961.

To: Mr. John W. Denhollem

From: Robert Roberts, Jr.

Subject: Operating Agreement—Barksdale Field Lease, Sligo Area, Bossier Parish, Louisiana.

This is in response to your memorandum of December 18, 1961, requesting my comment on recent correspondence concerning the effort to agree on a balancing provision (Section 3) for the Operating Agreement of February 1, 1961.

After our telephone conversation yesterday I find that in my file is a copy of the amendment submitted by Mississippi River Fuel Corporation with their letter of June 14, 1961. Shortly afterward I commented on Mississippi River's draft and send you herewith a copy of my memorandum to you of July 25th in that connection. I do not know that there is anything that I can add to the comments I made in that letter.

Texas Gas' letter of December 13th emphasizes the difficulty of the problem and the difference in point of view of the various parties: You do not want to buy any gas or set a price, and obviously several of the parties want to do just that.

As requested, your file is returned herewith.

Very truly yours,

/s/ Robert Roberts, Jr.

Encs—
RRJr:m

cc—Messrs. J. C. Templeton
M. C. Bubenzer
J. C. Cooke, Jr.

RESPONDENTS' APPENDIX E

Memorandum

Date: 10-22-62

To: Files

From: N. Orvis Frederick

Subject: BLM-A-054491, Sligo Field, Louisiana

J. C. Templeton, Vice President, Arkansas-Louisiana Gas Company, Shreveport, came in at 9:30 on Friday, October 19, 1962, to discuss the $34,723.45 deficit (as of 8-1-62) in royalty payments, mostly due to the 8.547¢ per MCF value placed on gas taken in kind being below reasonable value and below/ all sales from the same lease by their co-lessees.

Mr. Templeton is aware of the higher prices being paid for 85% of the gas from this lease, but maintained Ark-La is buying a great deal of gas from other producers in the field at the 8.5¢ +/MCF price by 1952 contracts (referred to in his letter to us dated 4-13-62); feared the other producers would be dissatisfied if Ark-La paid us more; and suggested a negotiated price. He was advised that these were unacceptable; that royalty would continue to be computed on the Union Producing Company price (our letter of 3-27-62) and in accordance with the lease instrument and regulations; and that Ark-La had the right of appeal.

He expressed little interest in an appeal but wished to have time to consult their attorney, who will be back from vacation in about a week, and then present the matter to the Company board (?), and that we would hear further from him in 10 to 14 days. It seemed most likely that Ark-La will agree to recalculate their royalty payments in agreement with our royalty statements.

/s/ N. Orvis Frederick
N. Orvis Frederick

Copy to Shreveport
NOF:cc

RESPONDENTS' APPENDIX F

Section 2(n) of Arkla's 1961 Protective Lease Contract with the United States Government Covering 2419.3 Acres in the Sligo Gas Field, Bossier Parish, Louisiana

"Lessee agrees: If owner, or operator, or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil or gas derived from lands under this lease, to accept and convey and, if a purchaser of such products, to purchase at reasonable rates and without discrimination the oil or gas of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing or selling oil, gas, natural gasoline, or other products obtained under a lease or permit granted by the United States."

RESPONDENTS' APPENDIX G

ARKANSAS LOUISIANA GAS COMPANY

Shreveport, Louisiana
November 6, 1962

Mr. Robert Roberts, Jr.

J. C. Templeton

Sligo Royalty Price

The Advisory Council approved my recommendation that ALG increase its royalty price to that requested in the U.S. Geological Survey letter of March 27, 1962. Please prepare a letter advising the U.S.G.S. which will protect us legally. Copies should be sent to all of the partners owning an interest in the lease.

FILED IN EVIDENCE IN SUIT No. 225-699
September 27, 1976

/s/ LARRY BASS
Deputy Clerk

JCT:me

cc: Mr. J. G. Cooke, Jr.

RESPONDENTS' APPENDIX H

ARKANSAS LOUISIANA GAS COMPANY

Shreveport, Louisiana

November 15, 1962.

Mr. J. R. Reeve, Regional Oil and Gas Supervisor,
United States Geological Survey,
521 Wright Building,
115 West 3rd Street,
Tulsa 3, Oklahoma.

In re: Oil and Gas Lease BLM-A-054491,
Sligo Field, Louisiana, Parcel No. 3

Dear Sir:

This refers to your letter to Natural Gas and Oil Company of October 12, 1962 and conference between the undersigned and you in your office in Tulsa on October 19th.

By your letter of March 27, 1962 you determined prices, so far as concerns the Government's royalty gas of $0.117432 per mcf until January 1, 1962; $0.130252 until January 1, 1967 and thereafter $0.140508 at a pressure base of 15.025 p.s.i.a. In view of the Government's right under the lease contract to determine the value of its royalty gas, but without conceding that the above figures represent market value in the Sligo Field, we have decided that we should accede to the determination and have initiated the proper procedures in our organization to see that accounting and payment is made for

Arkansas Louisiana Gas Company's share of the gas at the above figures.

Very truly yours,

/s/ J. C. TEMPLETON
J. C. Templeton,
Vice President.

cc: Washington 11/21/65

cc: Murphy Corporation

Union Producing Company

Texas Gas Exploration Corporation

Natural Gas and Oil Company

RESPONDENTS' APPENDIX I

BLANCHARD, WALKER, O'QUIN & ROBERTS
First National Bank Building
Post Office Drawer 1120
Shreveport, Louisiana 71163

Telephone (318) 231-8858

August 19, 1975

AIR MAIL
Securities and Exchange Commission
Attention: Mr. Blair Corkran
Division of Corporation Finance
Washington, D.C. 20549

RE: Arkansas Louisiana Gas Company,
Registration No. 2-54218, Form S-9

Dear Sirs:

This is in response to telephone conversation on Monday, August 18, yesterday, between Mr. Corkran and the undersigned as attorney for Arkansas Louisiana Gas Company. Mr. Corkran inquired as to whether the pending lawsuit of Frank J. Hall and fourteen other plaintiffs against Arkansas Louisiana Gas Company (the "Company"), No. 225,699 on the docket in the First Judicial District Court of Louisiana within and for the Parish of Caddo, should be described in the preliminary prospectus dated July 21, 1975, a part of the above registration, under the caption "Legal Proceedings" on page 19.

The suit referred to was filed in the First District Court, Caddo Parish, in October 1974, by fifteen plaintiffs, against the Company. The plaintiffs brought the suit on a contract between them (or in certain instances their predecessors) with a number of other sellers not party to the suit and the Company for the sale of gas to be produced from certain gas

production properties in the Sligo Gas Field, Bossier Parish, Louisiana. The contract was executed in January, 1952, and its term extends into 1980. The suit claimed that the agreed prices under the contract, by reason of payments made by the Company to the Federal Government under an oil and gas lease, beginning in 1961 were increased and had not been properly paid by the Company. The suit asked for a declaratory judgment, an accounting, and unspecified damages in the amount of $1.5 million. The defendant answered the suit denying plaintiffs' version of the agreement and claiming that the prices to the plaintiffs had been properly calculated and paid. After extensive preliminary proceedings, the plaintiffs on June 12, 1975 superseded their original demands with an amended petition on which the action is now pending. The amended petition appears to be for the same demand and on the same legal and factual basis as to the plaintiffs' claim, but instead of asking for an accounting, seeks damages for breach of the contract in an amount of $8,755,000 and cancellation of the contract. The Company believes that it has paid plaintiffs all sums due under the contract and experts to prevail on the principal issue of the suit. In addition, there are a number of other issues, the decision of which will be material if plaintiffs should prevail on their claim; for example, prescription (limitation), whether the Federal Power Commission has sole jurisdiction over plaintiffs' demand, the effect on the agreement and its interpretation and performance of the Natural Gas Act and the Federal Power Commission's regulations thereunder. It should also be stated that plaintiffs' demand, if they should prevail on their principal claim, is estimated by the Company to be not more than $3,500,000.

The reason this lawsuit was not reported in the prospectus is that, in our opinion, it is not "material" in the sense in which the Commission uses that term in its rules with regard to the preparation of prospectuses. If the entire eight million

dollar claim should be considered at issue in the suit, it would affect earnings by additional gas purchase expense with an offset to the extent of 50% by reducing income taxes, and, as we understand the proper accounting, the additional expense would be spread over the fourteen years back to 1961. If the entire amount at risk in the suit should be considered as affecting the year in which a judgment might become final, the risk, $4,377,000, would be barely more than 10% of the net income of the Company for the year ending May 31, 1975, as reported in the prospectus, and could be compared also with the income from continuing operations before income taxes (58.60 million dollars), and with the income from continuing operations (39.24 million dollars). The amount claimed is obviously less than 10% of current assets and less than 5% of total assets—tests of materiality which are mentioned in certain of the Commission's rules. The annual reduction in income would be in the order of $315,000.

We have no objection to describing the lawsuit in the prospectus; but since it is an action of the kind normally experienced in the business in which the Company is engaged, and it appears that a complete loss of the suit would not materially affect the Company or its prospectus, we concluded that it should not be described in the prospectus.

We would be glad to have your conclusions on this point.

Very truly yours,

/s/ Robert Roberts, Jr.

Blanchard, Walker, O'Quin & Roberts

RRJr/er

cc: Eugene R. Sullivan, Esq.
David G. Ormsby, Esq.

RESPONDENTS' APPENDIX J

Pertinent Findings and Conclusions of the United States District Court for the Western District of Louisiana In Its "Judgment On Remand" Dated February 2, 1976.

"This suit was filed in Louisiana State Court seeking damages for alleged breach of contract. . .

This claim is clearly merely a claim for breach of a contract, and would be determined by state law. . .

Stated in simplest form, the plaintiffs' arguments in the Second Petition are:

1. Plaintiffs and defendant have a contract under state law.
2. Defendant has violated the contract.
3. Plaintiffs may recover under state law.
4. This claim is not affected by federal law.
5. If it is, the plaintiffs still have a claim.

The plaintiffs' claim that they have the status of small producers is not an essential element of their cause of action. See Gully v. First National Bank, 1936, 299 U.S. 109, 57 S.C. 96, 81 L.Ed. 70. . .

See Eastern Petroleum Co. v. Kerr-McGee Corp., 7th Cir. 1971, 447 F.2d 569, where a case involving similar issues was removed to federal court on the ground of diversity but state law was applied. The jurisprudence relied upon in the motion for reconsideration indicates the correctness of the remand. . .

Accordingly the case is REMANDED to the First Judicial District Court, Parish of Caddo, State of Louisiana, defendant to bear all costs. . .

The stay order is vacated, and the remand to state court shall take effect without further orders."

RESPONDENTS' APPENDIX K

Pertinent Findings and Conclusions of the F.P.C. In Its "Order" Issued On March 8, 1976.

"Arkansas Louisiana Gas Company (Arkla) on September 11, 1975, filed a petition for a declaratory order in the above-entitled proceeding contending that the 'favored nations' clause in the January 11, 1952 contract with Frank J. Hall, et al. (Respondents) was not triggered by certain royalty payments made to the United States Government by Arkla. . .

The circumstances of the dispute between Arkla and Respondents do not call for any different result than that reached in the Pan American case, supra, or the Rowan case, supra. This case presents a question of concurrent jurisdiction, not primary or exclusive jurisdiction. The Commission has jurisdiction over rates, filing and notice as to both Arkla and Respondents. While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions.

For the reasons set forth above, Arkla's petition for declaratory order filed on September 11, 1975 in the above-entitled proceeding is denied."

RESPONDENTS' APPENDIX L

Pertinent Findings and Conclusions of the F.P.C. In Its "Order" Issued On November 8, 1976.

"On June 30, 1976, Frank J. Hall, et al. (Respondents) filed a Petition for Clarification and Amplification of the Commission's order dated June 4, 1976, whereby the Commission denied Arkansas Louisiana Gas Company's (ARKLA) petition for rehearing. On July 6, 1976, ARKLA filed a Limited Application for Rehearing, or in the Alternative, Clarification, of the Commission's June 4 order.

ARKLA originally had sought a determination that the 'favored nations' clause in its January 11, 1952 contract with Respondents was not triggered by certain royalty payments made to the United States Government by ARKLA. We held in our order issued March 8, 1976, that we would defer to the court to decide this contract issue.

Respondents request amplification of the Commission's order issued June 4, 1976, in regard to the maximum rates, for each year beginning in the fall of 1961 through the year 1972 which, if contractually authorized and if proper filing procedures had been followed, would have been approved by the Commission pursuant to its 'Other Southwest Area Rate' Opinion Nos. 607 and 607-A. The respective area base rate ceiling for sales of natural gas under Opinion Nos. 607 and 607-A from Northern Louisiana by a producer with contractual authority who properly filed are:

Prior to January 1, 1965	From January 1, 1965 Thru September 30, 1968	From October 1, 1968 Thru 1972
16.7¢ per Mcf at 15.025 psia	18.6¢ per Mcf at 15.025 psia	20.6¢ per Mcf at 15.025 psia

Where, as here, the sale contract provides for the sale of natural gas at the wellhead, the ceilings set forth above for such sale are subject to a 1.0¢ per Mcf downward adjustment for wellhead delivery.

Respondents also request that the Commission set forth and state:

> '1. That the Federal Power Commission pursuant to the Natural Gas Act, has not, since September, 1961 to the present date, regulated, limited or restricted the rates or prices which the respondents herein, if contractually authorized, could and should have been paid for their liquid hydrocarbons, gasoline, and plant products extracted from the wet or casinghead gas and which were sold to Arkansas Louisiana Gas Company pursuant to the January 11, 1952 'Most Favored Nation' contract and the related Arkansas Louisiana Gas Company division order contracts.'

While the Commission has jurisdiction over natural gas containing liquefiable hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream.[4] Consequently, if a contract provides for severable payments for the natural gas including the liquefiable hydrocarbons contained therein and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under their sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract. Since, as we indicated in our order issued March 8, 1976, herein, it is appropriate for a court to resolve contract questions pertaining to the sale of natural gas, it is clear that a court would also have jurisdiction to decide this contractual issue. . .

The Commission's Order Denying Application for Rehearing issued June 4, 1976, in the above-entitled docket number, is hereby clarified and amplified as set forth in the body of this order.

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[4] *Mobil Oil Corporation* v. *Federal Power Commission*, 483 F.2d 1238 (CADC 1973)."

RESPONDENTS' APPENDIX M

Pertinent Findings and Conclusions of the Louisiana State District Court In Its "Judgment" Dated October 14, 1977.

"The defendant in this case customarily listed the lessor as a 'seller' on its required division orders and required their signatures thereto. Essentially the same form was used by the defendant whether the product produced was oil, gas or condensate . . . these forms, in fact, listed the royalty owners as 'sellers'.

. . . the evidence shows the word 'seller' to have a broader usage and more general meaning than the more restricted definition [defendant] now asserts. . .

Defendant's principal argument is that in making payment to the United States under its lease, Exhibit P-45, that it was paying royalty as lessee, not purchasing gas as pipeline purchaser. On the contrary, defendant was acting in a dual capacity at one and the same time. It was paying royalty as lessee and purchasing gas as pipeline purchaser within the meaning and intent of Section 8(d).

For all of the above reasons it is the opinion of this Court that the acceptance of gas produced from the mineral lease executed by the United States, Exhibit P-45, by the defendant as a pipeline operator and payment therefor to the United States constituted a purchase of gas from another party seller within the meaning of the contract of plaintiff, Exhibit P-1.

The evidence demonstrates that the price paid to the United States per Mcf of gas was below the maximum area rate. . .

Defendant has pled prescription of one, three and ten years. The facts of this case are that the lease from the United States, Exhibit P-45, was not even of record in Caddo (Bossier) Parish, Louisiana, nor was the information available giving the prices being used to compute the Government's royalty payment until plaintiffs were able to obtain the information about June 25, 1974. Suit was filed July 18, 1974. Prescription does not run against one who is ignorant of the existence of facts that would entitle him to bring a suit, when such ignorance is not willful and does not result from negligence. Plaintiffs were not advised of the facts in this case until they succeeded in obtaining a letter dated June 25, 1974, from Mr. F. L. Stelzer which included the lease from the United States, Exhibit P-45, and the letter of establishing the price set by the Government, Exhibit P-65, and the letter in which defendant acceded thereto, Exhibit P-82. Under this state of facts prescription does not run against plaintiffs and defenadnt's pleas of prescription is to no avail."

RESPONDENTS' APPENDIX N

Pertinent Findings and Conclusions of the Louisiana State Court of Appeal In Its "Judgment" Rendered On May 1, 1978.

"Defendant's initial argument is in error because the relief sought is not that of a rate increase, but is instead a claim for damages arising under state contract law. Although the state court must adhere to the provisions of the Natural Gas Act and the pertinent regulations of the FERC in its determination of damages, it is a proper forum for adjudication of a state contract law dispute. Furthermore, the Natural Gas Act evinces no purpose to abrogate private rate contracts. *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 76 S. Ct. 373 (1956). The act recognizes the rights of the parties to rates established by individual contract and does not alter ordinary contractual relationships where the controversy is one of ordinary contract law. *Cities Service Gas Company* v. *Federal Power Commission*, 255 F.2d 860, *cert. den.* 358 U.S. 837, 79 S.Ct. 61 (1958); *Skelly Oil Co.* v. *Federal Power Commission*, 532 F.2d 177 (1976); *Phillips Petroleum Co.* v. *Federal Power Commission*, 349 F.2d 535 (1965). A claim founded on state contract law does not lose its character just because the Natural Gas Act is in some way involved. *Pan American Petro Corp.* v. *Superior Court of Del.*, 366 U.S. 656, 81 S.Ct. 1303 (1961).

. . . The major issue in the case before us is one of construing the provisions of a contract and the intentions of the parties at the time of the execution of the contract. Such a determination does not require the specific technical expertise of the FERC. Although the FERC may have original jurisdiction in this case, it does not have exclusive original jurisdiction, but rather shares concurrent original jurisdiction with the state court.

Plaintiffs contend payments made to the United States by defendant in its dual capacity as lessee and pipeline purchaser are tantamount to a 'purchase from another seller,' as this term was intended in the price adjustment clause of their 1952 gas sales contract with defendant. . .

The evidence shows that during the lengthy negotiations between defendant and the principal plaintiffs in 1952, defendant's prime objective in renegotiating the preexisting contract was to commit the plaintiffs to a long-term contract. As an inducement for a twenty-eighty-year-term the officials of the defendant corporation offered to include a Favored Nations clause. The request by plaintiffs to have the clause pivot on the highest market price being paid by anyone in the field was rejected by defendant.

The handwritten notations made at that time by the defendant's attorney who prepared the final draft of the agreement show that his instructions from the official of defendant handling the negotiations were to prepare a price adjustment clause based on 'highest price we pay for gas in the Sligo Field.' Thereafter, agreement on the subject clause was reached which tied it to the highest price being paid by defendant in the Sligo Field.

There is no evidence suggesting the description of the contracting parties as 'Buyer' and 'party sellers' was intended to have any restrictive legal meaning and the terms were apparently standard phrases contained in a Favored Nations clause of another contract used as a model by the attorney drafting the agreement. Indicative of the fact that little thought was given to these terms having any significant restrictive effect on the broad application of the clause is the absence of a definition of the words 'Buyer' and 'party seller' within the agreement. Although defendant strenuously urges that the terms 'Buyer,' 'seller,' and 'purchase' as used in the

Favored Nations Clause has a restrictive legal meaning and limits the applicability of the clause to 'sales' of gas, defendant's actions subsequent to execution of the contract show a tendency on its part to use sales terminology in a very broad manner to also include royalty interests in the preparation of division orders and the payment of royalty to lessors from a bank account styled 'Gas Purchase Account.'

The general rule of contract interpretation concerning a Favored Nations clause is that 'in order to give effect to the intention of the parties the Court must consider the circumstances surrounding the making of the contract, its subject, and the situation and relation of the parties at the time of its making; and the construction placed upon the contract by the parties to it as reflected by their words and acts is entitled to great, if not controlling influence in ascertaining the parties' understanding of its terms.' (Emphasis added) Louisiana-Nevada Transit Co. v. Woods, 393 F.Supp. 177 (1975).

For the foregoing reasons, we conclude the trial court was correct in holding that the payment by defendant for gas produced under the lease from the United States was within the scope of the price adjustment clause of plaintiffs' contract.

The evidence shows that in the fall of 1961 several of the officials of defendant were concerned that the royalty price negotiated with the United States might have the effect of activating the price adjustment clause of plaintiff's contract. The question was submitted to defendant's attorneys who advised that payment of royalty would not have this legal effect. Defendant did not make any disclosure to plaintiffs at that time or subsequently which would have allowed plaintiffs the opportunity to seek a determination before an appropriate tribunal. In early 1974 when inquiries were made by plaintiffs, the officials of Arkla were uncooperative and evasive in answer to questions concerning the possible purchase of gas from the United States."

RESPONDENTS' APPENDIX O

Pertinent Findings and Conclusions of the Louisiana Supreme Court In Its "Judgment" Of March 5, 1979.

"Plaintiffs, royalty interest owners, working interest owners, overriding royalty interest owners and unleased mineral interest owners, instituted this suit against Arkansas-Louisiana Gas Company to recover damages arising from an alleged breach of a gas purchase contract. . . .

The trial court first held that payments made by defendant to the United States government under the terms of the lease constituted a 'purchase from another party seller' within the meaning of the favored nations clause contained in the January 11, 1952 gas purchase contract entered into between plaintiffs and defendant. The court reasoned that defendant, in making payments to the United States government under its lease, was acting in a dual capacity: it was paying royalty as lessee and purchasing gas as pipeline purchaser. The court determined that defendant failed to advise plaintiffs of this fact or pay them the higher, contractually-authorized price. Having held that defendant breached the original gas purchase contract, the trial court next concluded that defendant would only be liable for damages (measured by the difference between the price paid the United States Government and the price paid plaintiffs). . .

The court of appeal affirmed the trial court, holding that defendant had breached the favored nations clause of its contract with plaintiffs and that plaintiffs were entitled to damages measured by the difference between the price paid by defendant to the United States government and the price paid to plaintiffs (after applying adjustments for pertinent factors). . .

We note, at the outset, that this controversy involves plaintiff's claims for damages arising from defendant's breach of a gas purchase contract. The claims herein are not founded upon any liability created by the Natural Gas Act, but, rather, are

founded upon a private contract deriving its force and effect from state law. There is no issue herein as to the reasonableness of the price, nor any attempt to adjudicate a proper rate, as defendant argues. Issues involving contract violation were not made subject to the cognizance of the Federal Power Commission by the enactment of the Natural Gas Act. Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961). The regulatory system of the Natural Gas Act is built upon private contracts, as modified by the Act, and the Act evinces no purpose to abrogate private gas purchase contracts. United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956). A determination of the appropriate measure of compensatory damages due plaintiffs as a result of defendant's breach of a private contract is, we believe, a matter particularly within the purview of our state law and state courts.

It is conceded by the parties before us that plaintiffs' recovery of damages arising from defendant's breach of the contract is to be measured by the difference between the price paid by defendant to the United States government and the price paid by it to plaintiffs (after adjustment for pertinent factors as indicated in the court of appeal opinion). . .

Article 2040, properly interpreted, means that the condition is considered fulfilled, when it is the debtor, bound under that condition who prevents the fulfillment. George W. Garig Transfer v. Harris, supra; Southport Mill v. Friedrichs, supra; Morrison v. Minton, supra. This rule is but an application of the long-established principles of law that he who prevents a thing may not avail himself of the non-performance he has occasioned and that one should not be able to take advantage of his own wrongful act. See Cox v. Department of Highways, 252 La. 22, 209 So.2d 9 (1968).

To realize this higher, contractually-authorized price, plaintiffs, pursuant to the Natural Gas Act were required to file new rate schedules with the Commission. However, plaintiffs were effectively precluded from making the requisite filings because they were not, at any time, informed by defendant that it was, in fact, paying a higher price to another party seller. Although defendant was only bound to pay plaintiffs a higher price if plaintiffs filed new rate schedules with the Commisison, it is apparent that defendant prevented the fulfillment of that condition (plaintiffs filing with the Commission) by failing to inform plaintiffs of its contractual arrangements with the United States government.

. . . Pursuant to article 2040 and this court's jurisprudence interpreting that article, the condition (that plaintiffs file new rate schedules) is considered fulfilled. Hence, plaintiffs' failure to file the new rate schedules in no way precludes plaintiffs recovery of damages for the entire period of defendant's breach (September 1961 through December 31, 1975) as measured by the difference in the price defendant paid the United States government and the price defendant paid plaintiffs. To hold otherwise would be in clear contravention of the spirit and intent of article 2040 and the jurisprudence of this court.[6]

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[6] We do not believe the debtor's bad faith or fraud (or lack thereof) is relevant to a determination of whether it has prevented the fulfillment of a condition under which it is bound. Planiol, in commenting upon the French counterpart of our article 2040, states, '[t]he act of the debtor, even when free from fraud, causes to the creditor a prejudice for which reparation is due, and the most complete reparation which can be offered to the creditor is the execution of the obligation, as if the condition had been accomplished. The act of the debtor can consist of any act whatsoever which prevents the realization of the condition.' 2 M. Planiol, Treatise on the Civil Law, No. 388 A (La.St.L.Inst. transl. 1959).

At trial a November 8, 1976 order of the Commission was produced which indicated the maximum rates to which plaintiffs would have been entitled if contractually authorized and if proper filing procedures had been followed (Exhibit D-59). The Commission clearly indicated in its order that it would have approved such rates. . . It appears reasonably certain that the amount of damages claimed by plaintiffs rests upon a certain basis.[7]

In sum, it is our opinion that plaintiffs are entitled to a recovery of an award of damages measured by the difference between the price defendant paid the United States government and the price defendant paid plaintiffs (after applying various adjustments for pertinent factors) for the entire period of defendant's breach of contract from September 1961 through December 31, 1975.

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[7] We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission."

RESPONDENTS' APPENDIX P

Pertinent Findings and Conclusions of the Louisiana State Court of Appeal In Its "Judgment" of January 22, 1980.

"The central issue in this appeal involves the sufficiency of the evidence used in comparing the difference in the price provisions of the two contracts, one contract being the gas purchase contract in 1952 containing the favored nation clause, and the other being the lease contract with the United States of America in 1961, payments under which have been construed as activating the favored nation clause of the other contract.

Under the 1961 lease, Arkla paid the government for the value of liquid hydrocarbons extracted from the natural gas and for the dry (residue) gas remaining after the extraction. . .

Arkla insists that the FERC ceiling on gas, whether *wet* (before extraction of LCH [liquid hydrocarbons]) or *dry* (after extraction of LHC) is the sole basis upon which damages should have been assessed and that the price it pays or paid to the United States for the extracted LHC is not a factor to be considered. . .

Again we determine that for the purpose of giving effect to the favored nation clause—section 8 of the contract, the higher price the United States began to receive from Arkla in 1961 for gas and for LHC is the basis upon which to assess and measure the amounts plaintiffs should have begun to receive monthly from Arkla in 1961 for its gas and LHC. Arkla conditionally concedes as much in its first reply brief:

> 'The values paid by Arkla to the United States for extracted plant products can and must be considered under this Court's May 1, 1978, judgment [359 So.2d 255 (La. App. 2d Cir.)] as a pertinent factor to determine the overall price paid to the government on a per Mcf basis.

> The Court has held that it is a pertinent factor and Arkla cannot attack that holding on this appeal. However, when the Court made that decision, the effect of the application of that pertinent factor on the Plaintiffs' monetary recovery was left to the Trial Court on remand. The Trial Court has considered the issues on remand and has rendered an award in its May 17, 1979, judgment, that is *again* grossly in error. This time, the [trial] Court failed to consider the limitations placed upon the award by the Natural Gas Act. The Plaintiffs award should be limited [to a total of $1,609,067.11] . . .'

We cannot agree that the trial court erred.

We reiterate that the purpose of the favored nation or price adjustment clause is to protect the seller under a long-term contract from price discrimination. A contract with favored nations provisions should be interpreted broadly, and not restrictively, to fully effect the provisions. 359 So.2d at p. 262. See also *Eastern Petroleum Company* v. *Kerr-McGee Corporation*, 447 F.2d 569 (C.A. 7th, 1971). Arkla paid the United States for gas and for LHC. Arkla paid plaintiffs for gas and LHC. . .

We have again reviewed in the original record, summaries and the testimony of the plaintiff-expert at whose direction they were prepared. We do not depart from our 1978 observation. . .

The Supreme Court of Louisiana agreed and FERC so understood.

> 'The Louisiana courts found that the contract provided for a price for the [LHC] products removed from the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.' Footnote 19, FERC, May 18, 1979, cited supra in Footnote 5.

. . . On the *basic contract question* (to use terminology frequently used by FERC) the effect of the lower court's finding, which we again approve, is that the contract shall be interpreted to entitle these plaintiffs to damages measured by what Arkla paid the United States for its gas *and* for LHC products severed from its gas. In effect Arkla paid the government and the plaintiffs for *wet* gas. The eventual price was determined by the MCF after extraction of LHC and by the price for the LHC. The price plaintiffs received for its gas after extraction of LHC and for the LHC was less than what the government received.

. . . The price provisions of plaintiffs' contract and of the United States' contract have been compared and the difference has been determined. Plaintiffs should receive for their gas and for the LHC in the gas the higher amount the United States was receiving for its gas *and* the LHC in the gas. *Gas* in the 1952 contract includes the LHC. Each contract contains price provisions for gas and for LHC. When the price provisions of the two contracts, comparing the pertinent factors, are considered, plaintiffs are entitled to the damages assessed.

Plaintiffs are not entitled to damages for frivolous appeal. At Arkla's cost, judgment is AFFIRMED."